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PECD BHD & ANOR

v.

MERINO-ODD SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
AZAHAR MOHAMED J
[ORIGINATING SUMMONS NO: D9 (D2)-336-2008]
3 MARCH 2009

C ***COMPANY LAW:*** *Arrangement, scheme of - Court approval - Application to court - Application for leave to convene meeting of creditors under s. 176(1) Companies Act 1965 - Application for order restraining legal proceedings against company under s. 176(10) Companies Act 1965 - Applications to be dealt with in summary way ex parte before judge in*
D *chambers - Requirement of frank and fair disclosure of all relevant materials - Failure by applicant to sufficiently identify key points of scheme of arrangement in supporting affidavits - Failure by applicant to disclose previous similar ex parte application made to another judge - Applications defective*

E ***COMPANY LAW:*** *Arrangement, scheme of - Court approval - Whether against public policy to sanction scheme of arrangement - Proposed scheme of arrangement involving utilization of monies in contravention of provisions of Capital Markets and Services Act 2007 - Whether scheme*
F *of arrangement not feasible*

PECD Construction Sdn Bhd (the 2nd applicant) and its holding company PECD Berhad (the 1st applicant) were insolvent. Both the applicants had filed an *ex parte* application and obtained the following orders: (i) Meetings of certain creditors of the applicants
G ('the Scheme Creditors') were ordered to be convened pursuant to s. 176(1) of the Companies Act 1965 ('the Act') within 90 days from the date thereof to consider a Scheme of Arrangement dated 22 October 2008 (the Scheme) proposed by the applicants; and (ii) A restraining order pursuant to s.176(10) of the Act ('the
H Restraining Order') on all legal proceedings against the applicants for a period of 90 days from the date of the order. The three interveners applied for the *ex parte* order to be set aside, *inter alia*, on the following grounds: (a) that a sum of RM30 million in question should not be utilized to fund the Scheme for the reason

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that these were monies held on trust by the 1st applicant in favour of the 3rd intervener; (b) that the Scheme was *mala fide*; (c) that there had been material non-disclosures on the part of the applicants when obtaining the *ex parte* order; and (d) that the applicants were hopelessly insolvent.

Held (setting aside the *ex parte* orders):

(1) Both s. 176(1) and s. 176(10) require the applications to be dealt with in a summary way which means the applications are dealt by way of *ex parte* before a judge in chambers. It is essential that there must be a frank and fair disclosure of all relevant materials including points that may be unfavorable to the applicant, so that if the relief is granted, it would rightly be granted. The court will require strict compliance of this requirement. (para 5)

(2) Under the Scheme proposed by the applicants, cash payments of RM40 million had to be paid to the three categories of the Scheme Creditors of the applicants. This cash payment of RM40 million was a very critical component of the scheme, without which the scheme was bound to fail. The applicants in obtaining the *ex parte* order did not in their supporting affidavits sufficiently identify and draw attention to this key point of the Scheme. (para 12)

(3) Out of the sum of RM40 million raised through the right issue exercise, RM30 million of the proceeds from the rights issue was raised for a very specific purpose, namely for the partial redemption of certain notes and was to have been paid to the 3rd intervener as trustee for the noteholders. Any utilization of RM30 million contrary to the purpose for which the same was raised would contravene the provisions of the Capital Markets and Services Act 2007 (CMSA). Thus, the RM30 million could not be distributed to the Scheme Creditors under the Scheme. It is against public policy to sanction such a Scheme. It was not a feasible Scheme which was capable of being presented to the Scheme Creditors of the applicants. (paras 14, 16 & 17)

(4) The RM30 million was monies held on trust by the 1st applicant in favour of the 3rd intervener as the sole or exclusive beneficiary. (para 24)

(5) The affidavit in support of an *ex parte* application must, *inter alia*, contain a clear statement of any facts known to the applicants which might lead the court not to grant relief *ex parte* and of whether any previous similar *ex parte* application has been made to any other judge, and if so, the order made in that previous application. The applicants elected not to disclose the decision of the learned judge dismissing the application to extend the 1st RO and the decision of the Court of Appeal dismissing the applicants' appeal against the dismissal of the extension of the 1st RO. The present Scheme was based substantially on the 1st Scheme, which was the subject matter and put forth before the learned judge in the 1st OS. (para 26)

Case(s) referred to:

Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567 ***(refd)***

Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(refd)***

Cooper v. PRG Powerhouse Ltd [2008] EWHC 498 ***(refd)***

Hasmah Abdul Rahman v. Kenny Chua Kien Lam [2006] 2 CLJ 1029 CA ***(refd)***

Industrial & General Insurance Company Limited and Others v. AON Group Limited [2003] EWHC 240 ***(refd)***

Jin Lin Wood Industries Sdn Bhd v. Mulpha International Bhd (No 2) [2005] 7 CLJ 208 HC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239 CA ***(refd)***

Malaysia Discounts Bhd & Ors v. Pesaka Astana (M) Sdn Bhd [2008] 5 CLJ 130 CA ***(refd)***

Metroplex Berhad & Ors v. Morgan Stanley Emerging Markets Inc & Ors & Another Appeals [2005] 3 CLJ 810 HC ***(refd)***

PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***

Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd [2001] 6 CLJ 129 HC ***(refd)***

Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750 CA ***(refd)***

Playcorp v. Venture Stores 7 ACSR 193 ***(refd)***

Re Clements Langford Pty Ltd [1961] VR 453 ***(refd)***

Re K Rees Emporium Ltd [1969] VR 981 ***(refd)***
Re Kuala Lumpur Industries Bhd & Ors [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 HC ***(refd)***
Re Mun Leong-Hankyu Jaya Sdn Bhd & Ors [1999] 4 AMR 4438 ***(refd)***
RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No 1) HC ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(refd)***
Twenty First Century Oils Sdn Bhd v. Bank Of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176(1), (3), (10)
Rules of the High Court 1980, O. 29 r. 2A

Other source(s) referred to:
Malaysian High Court Practice (Abridged Edition) Malayan Law Journal 1999, paras 29.1.15-29.1.17

For the applicants - Azhar Azizan Harun (Abdullah Abdul Rahman with him); M/s Cheang & Ariff
For the 1st intervener - Shanti Supramaniam; M/s Belden
For the 2nd intervener - M Menon; M/s Jaffar & Menon
For the 3rd intervener - Yoong Sin Man (Lau Kee Sern with him); M/s Shook Lin & Bok

Reported by Amutha Suppayah

JUDGMENT

Azahar Mohamed J:

[1] PECD Berhad (the 1st applicant) and PECD Construction Sdn Bhd (the 2nd applicant) are two ailing companies. The applicants are insolvent or, at least, on the verge of insolvency. The 1st applicant, a public limited company is the holding company of the 2nd applicant. Bursa Malaysia has announced its intention to delist the 1st applicant. According to the balance sheet of the 1st applicant as at the financial end 31 December 2007, the shareholders' fund stands at approximately negative RM908,210,930,596 with total liabilities of RM1,011,300,596. And based on the balance sheet of the 2nd applicant as at the

financial end 31 December 2007, the shareholders' fund stand at approximately negative RM853,783,131 with total liabilities of RM1,520,298,656.

[2] As a result of this state of affairs, both the applicants had on 13 August 2008, filed an *ex parte* application and obtained the following orders on 18 August 2008:

(i) Meetings of certain creditors of the applicants (the Scheme Creditors) were ordered to be convened pursuant to s. 176(1) of the Companies Act 1965 (the Act) within 90 days from the date thereof to consider a Scheme of Arrangement dated 22 October 2008 (the Scheme) proposed by the applicants.

(ii) A restraining order pursuant to s. 176(10) of the Act (the Restraining Order) on all legal proceedings against the applicants for a period of 90 days from the date of the order.

[3] Against this backdrop three enclosures, came up for hearing before me. The applications of Merino-ODD Sdn Bhd (the 1st intervener), Affin Bank Berhad (the 2nd intervener) and Am Trustee (the 3rd intervener) are to be found in encl. 19, encl. 30 and encl. 34 respectively.

[4] At this point, it is important to take a closer look at s. 176(1) and s. 176(10) of the Act. Now pursuant to s. 176(1), it is provided that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them the court may, on the application in a summary way of the company or of any creditor or member of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such manner as the court directs. Further s. 176(10) provides that where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on the application in a summary way of the company or of any member or creditor of the company restrain

further proceedings in any action or proceedings against the company except by leave of the court and subject to such terms as the court imposes.

[5] My view as to the workings of this statutory remedy is as follows: Where a company in financial difficulties proposes to compromise or enter into an arrangement with its creditors there are three stages to be undertaken under s. 176 of the Act. In the first place upon an application by an originating summons, the court will summon a meeting of the scheme creditors to consider the proposed scheme. Secondly, the scheme creditors will then vote on the proposed scheme. Lastly, if the scheme creditors approve the proposed scheme with the requisite statutory majority, the court will then sanction the scheme upon a separate application by the applicant (s. 176(3)). At any stage before or after an application for a court convened meeting under s. 176(1) is made, the court may grant a restraining order under s. 176(10) (see: *Re Kuala Lumpur Industries Bhd & Ors* [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86). The purposes of a restraining order under s. 176(10) are: (i) to protect the assets of the company pending the possible adoption of the scheme (see: *Playcorp v. Venture Stores* 7 ACSR 193); (ii) to allow the scheme creditors to properly consider the scheme without extraneous considerations; and (iii) to prevent the implementation of the scheme from being frustrated especially by legal suits (see: *Re Clements Langford Pty Ltd* [1961] VR 453; *Jin Lin Wood Industries Sdn Bhd v. Mulpha International Bhd (No 2)* [2005] 7 CLJ 208). It is essential to bear in mind that the power to order a court convened meeting is derived from s. 176(1) of the Act only when there is a scheme of arrangement being proposed. The court must have before it a *bona fide* proposal of a scheme of compromise or arrangement that is feasible and merits due consideration by the scheme creditors (see: *Re Kuala Lumpur Industries Bhd & Ors* [1991] 3 CLJ 2867; [1991] 3 CLJ (Rep) 86 and *Re K. Rees Emporium Ltd* [1969] VR 981). Both s. 176(1) and s. 176(10) require the applications to be dealt with in a summary way which means the applications are dealt by way of *ex parte* before a judge in chambers (see: *Re Kuala Lumpur Industries, Jin Lin Wood Industries Sdn Bhd v. Mulpha International Bhd (No 2)* [2005] 7 CLJ 208, *Sri-Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106, *Pelangi Airways Sdn Bhd v. Mayban Trustees Bhd* [2001] 6 CLJ 129

A and *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811). These 2 sub-sections of s. 176 may be brought independent of the other; it is not such that as. 176(10) application has to be tagged on to a s. 176(1) application (see: *Re Kuala Lumpur Industries Berhad*). An *ex parte* application is only apt for exceptional
B cases of valid urgency. Since the applications are dealt with *ex parte* and in a summary manner, it is essential that there must be a frank and fair disclosure of all relevant materials including points that may be unfavorable to the applicant, so that if the relief is granted, it would rightly be granted. The court will require strict
C compliance of this requirement.

[6] Coming back, then, to the present case; I think it is convenient that I should deal with all the three enclosures at the same time. All the three interveners have been given leave to
D intervene in these proceedings. Based on their applications, the 3rd intervener has applied for the whole of the *ex parte* order dated 18 August 2008 to be set aside. The 1st intervener and the 2nd intervener have applied for the restraining order to be set aside. In addition, the 1st intervener is also applying that as an
E alternative to setting aside the restraining order, the 1st intervener is to be excluded from the scheme. On the other hand, the 2nd intervener is also seeking to be excluded from the scheme. In furtherance, the 2nd intervener is also asking for the sum of RM7.5 million to be paid into an escrow account and to be
F frozen.

[7] There are four general grounds upon which the interveners have grounded their applications. In the first place, the 3rd intervener said that the RM30 million should not be utilized to
G fund the scheme for the reason that these are monies held on trust by the 1st applicant in favour of the 3rd intervener. Secondly, all the interveners have contended that the scheme is *mala fide*. Thirdly, all the interveners have maintained material non-disclosures on the part of the applicants when obtaining the *ex*
H *parte* order. Lastly, the interveners have stated that the applicants are hopelessly insolvent.

[8] To appreciate the arguments raised by all the parties, it is necessary to set out the concise background and sequence of relevant events leading to the applications in encl. 19, encl. 30
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and encl. 34. On 5 March 2008 the applicants applied by way of an *ex parte* Originating Summons No: D1-24-63-2008 (the 1st OS) for leave to convene a creditors' meeting to consider a scheme of arrangement (the 1st scheme) and for a Restraining Order of 90 days under s. 176(10) of the Act. However, on 24 April 2008 the learned judge dismissed the 1st O.S. Thereafter, the applicants appealed to the Court of Appeal against that decision. On 9 May 2008 the Court of Appeal allowed the appeal and a restraining order (the 1st RO) was granted for 60 days. Next, on 3 July 2008 the applicants applied to the learned judge to extend the 1st RO by another 30 days from 9 July 2008. On 14 July 2008 the learned judge dismissed the applicants' application to extend the 1st RO. The applicants appealed to the Court of Appeal but the appeal was dismissed. Therefore, the 1st RO was not extended. Then on 13 August 2008 an important event happened; by way of a fresh *ex parte* Originating Summons No. D2-24-336-2008 (the present proceedings) the applicants applied for leave to convene a creditors' meeting to consider the scheme and a fresh restraining order for 90 days. And as stated earlier, the learned judge granted the order on 18 August 2008. It is this order which is now the subject matter of encl. 19, encl. 30 and encl. 34.

[9] The scheme can be found at exh. A19 at encl. 1B (the 1st applicant's supporting affidavit). All the interveners strenuously and vigorously opposed the scheme. In this regard learned counsel for the applicants argued that the matters raised by the interveners ought to be addressed at the sanction stage under s. 176(3) of the Act which says that if a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to any compromise or arrangement the compromise or arrangement shall, if approved by order of the court, be binding on all the creditors or class of creditors or on the members or class of members (as the case may be) and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

[10] In my view, based on *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106, *Metroplex Bhd & Ors v. Morgan Stanley Emerging Markets Inc & Ors & Another Appeal* [2005] 3 CLJ 810 HC, *Twenty First Century Oils*

Sdn Bhd v. Bank Of Commerce (M) Bhd & Ors (No 2) [1993] 2 CLJ 677, this court at this stage can evaluate and consider whether the scheme between the applicants and its scheme creditors is viable and feasible, thereby capable of being presented to the scheme creditors to be voted upon. In *Sri Hartamas* case Siti Norma Yaakob J (as she then was) said:

> The court must now give a critical eye as to whether the scheme is a viable one so as to conciliate the relations between the applicant and its three classes of creditors for the common benefit of the same classes of creditors to whom the scheme is intended to be addressed ...
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> I accept the fact that this court is not equipped to inquire into the practical implications of the scheme but nevertheless by virtue of s. 176(4) of the Act, which gives me the discretion not only to order a creditors' meeting under sub-s (1) but also to refuse to make an order for such a meeting, I consider that I can evaluate and consider whether the scheme is reasonable and fair so as to benefit all three classes of creditors based on the information disclosed by the applicant as to the framework of the scheme itself. For that purpose I shall now consider the significant features of the scheme and their legal aspects and to determine whether they offend any principles of law that negative the exercise of my discretion to order the creditors' meetings in the first place ...
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> The other objection raised is that the applicant is hopelessly insolvent and that it is against public policy to sanction any scheme that it proposes to undertake. The test of the insolvency of any company must be viewed in the commercial sense, that is, its inability to meet current demands irrespective of whether the company is possessed of assets, which if realized, would enable it to discharge its liability in full. See the cases of *Re Sunshine Securities (Pte) Ltd* [1978] 1 MLJ 57, *Malayan Plant (Pte) Ltd v. Moscow Norodny Bank Ltd* [1980] 2 MLJ 53 and *Re Hong Huat Realty (M) Sdn Bhd* [1987] 2 MLJ 502.
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> I have already detailed the extent of the applicant's liabilities and the fact that it owns lands, the potential value of which need to be tapped by developing them into a housing and commercial estate does not make the applicant any less insolvent. It was in circumstances somewhat similar in the case of *Re Buildmat (Australia) Ltd* [1983] 1 ACLC 919; [1983] 7 ACLR 944 that the Supreme Court of New South Wales had to consider whether

to order a creditors' meeting to approve a proposal to be undertaken by a company that was hopelessly insolvent. In refusing to make the order, the court held that it is against public policy to approve any scheme to be undertaken by an insolvent company as to order otherwise would amount to the court 'condoning or encouraging persons in our commercial community to carry on business activities in a company which was handicapped by a heavy burden of indebtedness and thereby unable to pay debts in full at any given time'. The court also held that in exercising its discretion, the court is not only concerned with the interests of the creditors themselves but also with its duty to uphold the commercial morality of the country. Under such circumstances, even if the creditors were to approve the scheme, the court would not do so. In this respect, the applicant's contention that regardless of its insolvency, an opportunity be given for it to present the scheme to the creditors so that they can object to it, if they wish to, cannot carry any weight as the demands of public policy far outweigh any plea of an opportunity to be heard on the scheme before the creditors ...

In addition, it is not disputed that being hopelessly insolvent, it is against public policy to approve a scheme to be undertaken by an insolvent company even though the creditors may come to approve the scheme if it is presented to them. In this case, if the scheme is implemented, the applicant will be left to carry on business but with liabilities well in excess of $299m with no realizable assets whatsoever as the lands would naturally be charged to the financiers to secure the $40m credit facilities. These two matters alone justify my holding that there is no *bona fide* attempt to conciliate the relations between the applicant and respondent for the common benefit of the other creditors to whom the scheme is also intended to be addressed.

[11] Having regard to the factual situation of the present case and based on the facts as presented, in my view, the complaints raised by the interveners ought not be left at the sanction stage under s. 176(3) of the Act.

[12] It is important to keep in mind that under the scheme proposed by the applicants, cash payments of RM40 million will be paid to the three categories of the scheme creditors of the applicants. This cash payment of RM40 million is a very critical component of the scheme, without which the scheme is bound to fail. I observe that the applicants in obtaining the *ex parte* order of 18 August 2008 did not in their supporting affidavits sufficiently

identify and draw attention to this key point of the scheme. The scheme hinges upon the availability of the sum. It is not disputed that the fate of the scheme depends on the availability of RM40 million to be distributed to the scheme creditors.

[13] Now the source of the fund of RM40 million is not through fresh injection of capital or the entry of the so-called "white knight" to facilitate the survival of the applicants. The source of the purported fund comes in this manner. In June 2007, the applicants announced its plan to undertake a renounceable rights issue together with free detachable warrants on the basis of two rights issue with one free detachable warrant for every two existing ordinary shares held. This exercise was part of their overall turnaround initiatives announced in October 2007, and was completed on 30 November 2007, raising RM104,168,256 through the issuance of 208,336.512 new shares. The surplus of the rights issue exercise as at 30 June 2008 is RM40,076,000 and under the scheme it is this surplus cash payment of RM40 million will be paid to the scheme creditors of the applicants.

[14] The important point which requires to be kept in mind that cannot be overlooked is that out of the sum of RM40 million raised through the right issue exercise, RM30 million of the proceeds from the rights issue was raised for a very specific purpose, namely for the partial redemption of certain notes and was to have been paid to the 3rd intervener as trustee for the noteholders. I think I need to explain about these notes. On 14 October 2004 a Murabahah Notes Issuance Facility Agreement was executed by PECD Jaya Holdings Sdn Bhd (formerly known as Peremba Jaya Holdings Sdn Bhd) ("the issuer") to issue certain notes of up to RM200 million to various noteholders (investors). On 14 October 2004, the 3rd intervener acts as trustee for the noteholders in relation to the notes, pursuant to the trust deed of 14 October 2004 and as amended by a Supplemental Trust Deed dated 17 October 2005. The issuer defaulted in payments under the notes which led to the 3rd intervener and noteholders considering legal action to be taken. The 1st applicant and holding company of the issuer, requested indulgence in respect of the issuer's default and in consideration thereof, agreed to pay to the 3rd intervener RM30 million from the 1st applicant's rights issue exercise. On 1 August 2007 a letter of undertaking was issued by

the 1st applicant to the 3rd intervener that a sum of RM30 million from the proceeds received from its rights issue exercise will be paid to the 3rd intervener towards payment of moneys owing under the notes and that such payment will be made not later than seven days after the date of receipt by the 1st applicant of such proceeds from the rights issue. On 26 September 2007, the Securities Commission ("SC") approved the 1st applicant's right issue exercise including the utilization of the rights issue monies, of which RM30 million was to be paid to part-settle the notes, As required by law, the 1st applicant issued a circular to its shareholders on rights issue. In it, it was expressly stated that from proceeds of rights issue raised from the shareholders, RM30 million will be paid for part-settlement of the notes. On 10 October 2007, the 1st applicant's shareholders approved the 1st applicant's right issue exercise and subscribed to such rights issue shares. On 30 November 2007, the rights shares was granted listing and quoted on the Bursa Malaysia. On 11 January 2008, the 1st applicant after receiving the rights issue proceeds, refused to pay the sum of RM30 million to the 3rd intervener. On 5 May 2008 a letter of protest was issued by the trustee to the SC on the 1st applicant's refusal to pay the RM30 million. On 8 May 2008 a letter of demand was issued to the 1st applicant for payment of the RM30 million.

[15] On that note, the point to make here is this. The RM30 million was raised from the shareholders of a public listed company pursuant to legislation, namely the Capital Markets and Services Act 2007 (CMSA). I think it is imperative that I repeat here that the proceeds from the rights issue (RM30 million) was raised for a very restricted and exclusive purpose, namely for the partial redemption of the notes and was to have been paid to the 3rd intervener as trustee for the noteholders. Two points should now be made. The first is that the legislation ensures that it is incumbent on the 1st applicant to provide relevant and accurate disclosure of all material information for its shareholders to evaluate the merits of their investments. A disclosure-based regulatory framework involves a full and accurate disclosure of all relevant information that would enable shareholders to make informed investment decision and therefore appropriate standard of disclosure must be complied with. And the second is that the

RM30 million was raised from shareholders of a public listed company and the 1st applicant could only have been allowed to do so provided the purposes for which the rights issue proceeds are raised are rigorously met. The market activities of the 1st applicant should not be carried out in a way that is in conflict with the provisions of the CMSA.

[16] In my view, there is merit in the arguments of learned counsel for the 3rd intervener that if the 1st applicant were to utilize the RM30 million contrary to the object for which the same was raised, the 1st applicant would have misled and misrepresented the intention of its funds raising exercise to its shareholders, the public and the SC concerning the rights issue exercise. When looked at in this way, one can see that any utilization of RM30 million contrary to the purpose for which the same was raised would contravene the provisions of the CMSA, which might attract penal sanction. It is an offence under the CMSA if the terms and conditions of the SC for rights issue are not met. It is also an offence if false or misleading statements are made to the SC. In addition, the CMSA also provides that it is an offence if abridged prospectus for rights issue contains misleading information. No judgment of this court will be intended to aid any contravention of law. This court will not compromise on shareholder protection and market integrity. This is required and vital in order to instill confidence among investors of the integrity of our capital market and the economic sector of our country. In this connection, the authority that I would like to refer is the case of *Hasmah Abdul Rahman v. Kenny Chua Kien Lam* [2006] 2 CLJ 1029. In that case, the respondent was the Managing Director of the company and an attempt was made to float the company on the second board of the then Kuala Lumpur Stock Exchange (the KLSE), whereby the respondent was required to comply with several requirements by the SC, the KLSE and other relevant statutory provisions. There was a purported sale of the shares in the company by the respondent to the appellant and subsequently, a dispute arose as to whether such sale was genuine. The Court of Appeal refused to find for the respondent as he had practised a deception on the authorities. At p. 1038, the court said:

> The reason for finding illegality was not one of statutory illegality but that Bank Negara, a public authority, had been deceived and that the primary object of the entire exercise was to practise such deception. The court accepted the legal principle postulated in the case of *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170 which held that where ...
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> Hence, in our view the purported sale of the shares in SBBS from the respondent to the appellant amounted to nothing more than 'a transaction which on the face of it is lawful is entered into for an unlawful purpose or to achieve an unlawful end.' There was indeed a deception practised on the relevant approving bodies which were part and parcel of the public administration on this country. Indeed, the respondent had come to seek for assistance from the court with unclean hands. The transaction was therefore tainted with illegality right from the start and thus unenforceable.

[17] Thus, in my view, the RM30 million could not be distributed to the scheme creditors under the scheme. To my mind, it is against public policy to sanction such a scheme. It is not a feasible scheme which is capable of being presented to the scheme creditors of the applicants.

[18] The further ground upon which the 3rd intervener has grounded its application in encl. 34 is that the RM30 million that the 1st applicant undertook in its letter of undertaking dated 1 August 2007 to pay the MUNIF noteholders from the 1st applicant's rights issue of RM40 million are monies held on trust by the 1st applicant and may not be distributed under the scheme. In this regard, learned counsel for the applicants argued that in respect of the RM30 million proceeds from the rights issue there is no common intention to create a trust and that the language used does not give rise to a trust. According to him the circular to the shareholders of the 1st applicant and a prospectus to the prospective subscriber of the rights issue merely set out the proposed utilization of proceeds. He further argued that there is no special arrangement for the creation of trust. He argued there is no arrangement for the RM30 million to be refunded to the subscribers if it is not paid to the 3rd intervener and there is also no arrangement for the RM30 million to be put in a special account. As a final point he emphasized that in the circumstances, no trust has been created in respect of the RM30 million.

[19] However, it is my view that there is more merit in the submission of learned counsel for the 3rd intervener that the monies raised by the 1st applicant are trust monies. In *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 at 580 it was held that:

> That arrangements of this character for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.
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> The basis for the decision was thus clearly stated, *viz*, that the money advanced for the specific purpose did not become part of the bankrupt's estate.

[20] Our Court of Appeal in *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750 at 763 said:

> This is called a 'Quistclose' trust, taking its name from the leading case on the point, *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567. In those circumstances, if the money had been used for some purpose other than the purchase of Fimaly shares, that would amount to a breach of trust by Raja Zainal. This would entitle the plaintiffs to trace the money into the product of breach of trust. And, if the first defendant (confining myself to the present facts) dishonestly assisted Raja Zainal in the breach, then it would be liable as a fiduciary with a duty to account for the trust money.

[21] Also our Court of Appeal in *Malaysia Discounts Berhad & Ors v. Pesaka Astana (M) Sdn Bhd* [2008] 5 CLJ 130 at 158 held that as the issuer of bonds had undertaken that proceeds from government contracts will be utilised to settle that bonds, the trustee for the bondholders had a proprietary claim to such monies.

[22] Further on this point, in *Cooper v. PRG Powerhouse Ltd* [2008] EWHC 498 the court observed that:

> It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract. As North J explained in *Gibert v. Gonard* [1884] 54 LJ Ch 439, 440: 'It is very well known law that if one person makes a payment

> to another for a certain purpose, and that person takes the money knowing that it is for that purpose, he must apply it to the purpose for which it was given. He may decline to take it if he likes; but if he chooses to accept the money tendered for a particular purpose, it is his duty, and there is a legal obligation on him, to apply it for that purpose ...
>
> If not express there was clearly to be implied into the arrangement that neither Mr Cooper nor the Company regarded the amount of the payment as part of the assets of the company at its 'free disposal' and available, in particular, as working capital or for payment of its creditors.

[23] Finally, in *Industrial & General Insurance Company Limited and others v. A O N Group Limited* [2003] EWHC 240 the court said:

> In my view the same conclusion follows where a person pays money to another for the specific purpose of settling his liability to various creditors, because he retains an interest in the money until it is applied for its purpose. However, a different conclusion would follow where the person who paid the money did not envisage that any of it would come back to him. In that case the payee would either obtain the whole of the legal and beneficial interest in the money, ie, it would be a payment to him outright, or he would hold it in trust for third parties and perhaps himself as well.

[24] In my view the RM30 million proceeds received by the 1st applicant from the rights issue exercise were expressly for the purpose of paying the 3rd intervener and are therefore monies held on trust by the 1st applicant in favour of the 3rd intervener as the sole or exclusive beneficiary of the same.

[25] Now I come to a different point. Learned counsel for the 1st and the 2nd interveners argued that the applicants in obtaining the *ex parte* order of 18 August 2008 failed to disclose certain material facts, namely the applicants' application to extend the 1st RO was refused by the learned judge in the 1st OS and that the Court of Appeal dismissed the applicants' appeal against the dismissal of the extension of the 1st RO.

[26] Now, how much detail should the affidavit contain? The affidavit in support of an *ex parte* application must, *inter alia*, contain a clear statement of any facts known to the applicants which might lead the court not to grant relief *ex parte* and of

whether any previous similar *ex parte* application has been made to any other judge, and if so, the order made in that previous application (see as an illustration the mandatory requirement under O. 29 r. 2A of the Rules of the High Court 1980; *Malaysian High Court Practice* (Abridged Edition) Malayan Law Journal 1999, paras 29.1.15-29.1.17). It is vital to disclose any point which might be favorable to the other parties to take it if they were present at the *ex parte* application. Where there is doubt as to whether a fact is material or otherwise, I think it is better to disclose it. Whilst I observe that the applicants in their affidavit in support of the *ex parte* application of 13 August 2008 did mention about the 1st RO of 60 days dated 9 May 2008 granted by the Court of Appeal, the crucial point that require to be kept in mind is that the applicants elected not to disclose the decision of the learned judge dismissing the application to extend the 1st RO and the decision of the Court of Appeal dismissing the applicants' appeal against the dismissal of the extension of the 1st RO. In this regard, it must be emphasized that the present scheme is based substantially on the 1st scheme, which was the subject matter and put forth before the learned judge in the 1st OS. Given this, in my view, all orders emanated from the 1st OS by the learned judge including the dismissal of the application for extension of the 1st RO and the subsequent dismissal of the appeal by the Court of Appeal against that decision are material facts and particulars which should have been disclosed in the present proceedings.

[27] What is the effect? As stated earlier, when a party makes an *ex parte* application to the court of any kind, he must make a full and frank disclosure of all relevant matters. It as an established principle of law where there is a failure to disclose material facts within the knowledge of a party in an *ex parte* application, this will result in the court setting aside the *ex parte* order obtained. In *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bhd* [2009] 2 CLJ 445 our Court of Appeal said:

> It is an established general rule of law that when a party makes an *ex parte* application to the court of any kind, he must make a full and frank disclosure of all relevant matters. This general rule applies in particular to an *ex parte* application for extension of the validity of a writ; and an extension can be refused on this ground alone: per Lord Brandon of Oakbrook, speaking for the House of Lords in *Baly & Anor.*

In, *The King v. The Special Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, ex parte Princess Edmond De Polignac* [1917] 1 KB 486, at p 509, Warrington CJ held, *inter alia*, as perfectly well settled that a person who makes an *ex parte* application to the court ie, in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by reason of the order which has thus wrongly been obtained by him.

Within our shores, in *Creative Finishing Sdn Bhd v. Wong Koi @ Wong Khoon Foh d/a Syarikat Sri Jaya* [1989] 2 CLJ 93, at p. 96 (SC), Mohd Azmi SCJ (as he then was) explained that:

(i) in presenting affidavit evidence for an *ex parte* order, it is incumbent upon an applicant to make full and frank disclosure of all material facts;

(ii) every material representation must not be misleading, and there must not be any suppression of material facts; and

(iii) failure to do so at the crucial time of making the *ex parte* application would invariably be fatal.

A similar sentiment was shown by Steve Shim J (later CJ (Sabah and Sarawak)) in *Yeoh Kee Aun*, at p. 514 to the effect that where there is a failure to disclose material facts within his knowledge in an *ex parte* application by a party or where there is any material misrepresentation, it will result in the court setting aside the *ex parte* order obtained.

I would respectfully add that the *raison d'tere*, for the aforesaid established general rule of law, is that an *ex parte* application is an application *uberrimae fidei* ie, of the utmost good faith and the court has to rely on the unilateral version of the applicant who must candidly and faithfully tell the truth, the whole truth and nothing but the truth. Anything short of that utmost good faith will invariably render the *ex parte* application fundamentally flawed and on that ground alone, result in the inevitable setting aside of the *ex parte* order so obtained.

(see also: *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koprasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239); *Re Mun Leong-Hankyu Jaya Sdn Bhd & 5 Others* [1999] 4 AMR 4438). This is the principle which I would act upon in the present case. In my view the applicants had failed to disclose material facts concerning the refusal by the learned judge and the Court of Appeal in the 1st OS to extend the 1st RO.

[28] As a consequence, based on all the aforesaid reasons, I would set aside the *ex parte* ordered obtained on 18 August 2008. Accordingly, I make an order in terms of encl.19 paras 2 and 5; encl. 30 paras 1 and 2; and encl. 34 paras c and d.